

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

RESPONSE OF THE OFFICE OF MERGERS AND
ACQUISITIONS
DIVISION OF CORPORATION FINANCE

June 13, 2008
Our Ref. No. 2008441148
Eaton Vance Management
File No. 801-15930

Your letter dated June 12, 2008 requests our assurance that we would not recommend enforcement action to the Securities and Exchange Commission (“Commission”) under Sections 34(b) or 35(d) of the Investment Company Act of 1940 (the “Investment Company Act”) or Rule 22c-1 thereunder against open-end investment companies that hold themselves out as money market funds in reliance on Rule 2a-7 under the Act (“Money Market Funds”) if they purchase liquidity protected preferred shares (“LPP”), a new type of preferred stock described in your letter, to be issued by closed-end investment companies (“Funds”) advised by Eaton Vance Management (“Eaton Vance”).¹

Your letter also requests that we concur with your view that the LPP would not be redeemable securities, as defined in Section 2(a)(32) of the Investment Company Act, if: (a) the Funds issue LPP that is subject to purchase in certain circumstances by a third-party liquidity provider (“Liquidity Provider”); and (b) the Liquidity Provider has the right to sell any such LPP to an affiliate of the Funds or to the Funds themselves in certain circumstances, as described in your letter.

Finally, you request that we confirm that Sections 13(e) and 14(d) of the Securities Exchange Act of 1934 (the “Exchange Act”), and Rule 13e-4 and Regulations 14D and 14E thereunder would not be applicable to the Funds, the Liquidity Provider or any other third party in connection with the purchases of LPP that are not otherwise sold in remarketing processes, as described in your letter. In the alternative, your letter requests our assurance that we would not

¹ Money market funds that fail to meet certain conditions of Rule 2a-7 may violate Sections 34(b) and 35(d) of the Investment Company Act. *See* Paragraph (b) of Rule 2a-7. Section 34(b), in relevant part, makes it unlawful for any person to make an untrue statement of material fact in a registration statement or other document filed pursuant to the Investment Company Act. Section 35(d) makes it unlawful for any registered investment company to adopt as part of its name any word or words that the Commission finds materially deceptive or misleading, and authorizes the Commission to adopt rules to define such names as are materially deceptive or misleading. Money Market Funds that do not satisfy Rule 2a-7’s conditions may also violate Rule 22c-1 under the Investment Company Act, which requires open-end funds to sell and redeem their shares at a price based on current net asset value, if they use the amortized cost method, as defined in Rule 2a-7(a)(2), to value their portfolio securities. *See* Section 2(a)(41) of the Investment Company Act (defining value) and Rules 2a-4 (defining current net asset value) and 2a-7(c) thereunder (Money Market Fund share price calculations).

recommend enforcement action to the Commission under Sections 13(e) and 14(d) of the Exchange Act and Rules 13e-4 and Regulations 14D and 14E thereunder against the Funds, the Liquidity Provider, or any other third party in connection with the purchase of LPP that are not otherwise sold in remarketing processes, as described in your letter.

I. Facts

As described in your letter, a number of Funds have outstanding one or more series of auction rate preferred shares (“ARP”), and the current disruption in the auction rate securities market imposes significant hardship on ARP holders that need access to liquidity. You state that it is highly unlikely that the existing auction markets for ARP will resume normal functioning in the near term. In light of these events, and in an effort to create a more stable long-term market for preferred shares issued by closed-end funds, Eaton Vance is developing LPP as a permissible investment for Money Market Funds.

You state that the Funds propose to offer LPP to supplement or replace their existing ARP. The LPP will pay a dividend that will be reset every seven days in a remarketing process administered by one or more financial institutions acting as remarketing agent(s). After providing a preliminary notice of the likely dividend rate, the remarketing agent(s) will solicit existing holders and potential buyers for indications of interest. The remarketing agent(s) will then match buyers and sellers at the lowest possible dividend rate. Under normal circumstances, the dividend rate in each remarketing will be set as the lowest possible rate at which all of the LPP would be either held or bought after matching up sell, bid and buy orders. All orders to buy and sell LPP in any remarketing will be subject to a cap rate (the “Boundary Rate”).² The LPP will be sold only at a price equal to their \$25,000 per share liquidation preference plus accumulated and unpaid dividends. Within three days of the remarketing, proceeds from the sales of the LPP will be remitted to holders of the LPP participating in the remarketing.³

You state that each Fund will enter into an agreement (the “Liquidity Agreement”) with a Liquidity Provider. Under the Liquidity Agreement, the Liquidity Provider will have a contractual obligation (the “Liquidity Event Feature”) to purchase unconditionally all LPP subject to sell orders in a remarketing that have not been matched with purchase orders (a “Liquidity Event”). You represent that, before entering into the Liquidity Agreement, the Liquidity Provider will have received a short-term rating in one of the two highest short-term rating categories from the Requisite Nationally Recognized Statistical Rating Organizations

² You state that the Boundary Rate will be set as either (a) a specified interest rate (e.g., two-month LIBOR) plus a specified number of basis points, or (b) a specified percentage of a specified interest rate (e.g., a percentage times two-month LIBOR).

³ You state that the same considerations, analysis and conclusions would apply to preferred stock with liquidity protection features substantially the same as the LPP but that trades in an auction process similar to that in which ARP trade.

(“NRSROs”) with respect to a class of debt obligations that is comparable in priority and security to the Liquidity Event Feature.⁴

You represent that, as a result of the Liquidity Agreement, any LPP holder (including any Money Market Fund) that seeks to sell its holdings will be able to do so.⁵ Like all other LPP sold in a remarketing, the LPP purchased by the Liquidity Provider will be bought at a price equal to the \$25,000 per share liquidation preference plus accumulated but unpaid dividends. In the event that a Liquidity Agreement will not be renewed, will otherwise be terminated, or a new Liquidity Agreement with a replacement Liquidity Provider will be entered into, holders of the LPP will be notified at least two remarketings in advance of such event and given the opportunity to sell their LPP in these remarketings. Thus, you state that LPP holders will always have the opportunity to sell their LPP pursuant to the Liquidity Agreement, if necessary, on at least two occasions subsequent to the receipt of notice of a change in or termination of the Liquidity Agreement.

You state that after a Liquidity Event has occurred, additional terms may take effect. These include: (a) escalating dividend rates;⁶ and (b) additional fees that Funds will pay to the Liquidity Provider.⁷ In addition, there may be an agreement under which the Liquidity Provider would have rights to sell (or “put”) any of the LPP that it had purchased to the parent company

⁴ Rule 2a-7 limits a Money Market Fund’s portfolio investments to securities that have received credit ratings from the Requisite NRSROs in one of the two highest short-term rating categories or comparable unrated securities (*i.e.*, “Eligible Securities”). A security that is subject to a Guarantee, as defined in Rule 2a-7(a)(15), may be determined to be an Eligible Security based solely on the rating assigned to the Guarantee, under paragraph (c)(3)(iii) of Rule 2a-7. The term “Requisite NRSROs” is defined in Rule 2a-7(a)(21).

⁵ Upon completion of the remarketing, the Liquidity Provider will be required to purchase automatically all LPP subject to sell orders that have not been fulfilled with purchase orders.

⁶ If upon any given Liquidity Event the Liquidity Provider is required to purchase LPP in an amount less than 50% (or some other agreed-upon percentage) (the “Trigger Percent”) of the shares in the remarketing, the dividend rate for the next dividend period will be the Boundary Rate. If, however, the Liquidity Provider is required to purchase more than the Trigger Percent of the shares in a particular remarketing, the dividend rate will be the last Boundary Rate plus an additional pre-determined percentage (the “Raised Boundary Rate”). If upon subsequent consecutive remarketings the Liquidity Provider must continue to purchase greater than the Trigger Percent of the shares, then the dividend rate will be the Raised Boundary Rate plus an increasing pre-determined percentage up to a specified maximum.

⁷ You state that the Funds will pay a bifurcated fee to the Liquidity Provider; one fee on the committed amount of the liquidity facility and a second fee for amounts drawn to purchase LPP pursuant to a Liquidity Event. Accordingly, the Liquidity Provider will receive an overall higher fee to the extent that the liquidity facility is used.

of the Funds' investment adviser, Eaton Vance Corp. ("EVC" and the "EVC Put"),⁸ or to the issuing Fund (the "Fund Put"), at a price per share equal to the liquidation preference.

You state that the precise terms of the EVC Put are subject to negotiation with a particular Liquidity Provider. You expect, however, that for the nine-month period ending on the first anniversary of the effectiveness of the Liquidity Agreement (the "Anniversary Date"), if the Liquidity Provider owns all outstanding LPP, the Liquidity Provider may exercise the EVC Put with respect to all LPP that it owns. On the Anniversary Date, if the Liquidity Provider owns any outstanding LPP, the Liquidity Provider may exercise the EVC Put with respect to all LPP that it owns.⁹

You state that a Fund may provide a Liquidity Provider with a Fund Put as an inducement to potential Liquidity Providers, both initially (in lieu of the EVC Put) and on an ongoing basis. The Fund Put would be exercisable only (a) upon the expiration of not less than one year from the effective date of the Liquidity Agreement, and (b) with respect to any LPP that the Liquidity Provider has held for no less than three consecutive months and unsuccessfully attempted to sell in remarketings. You state that the Liquidity Provider would be able to exercise a Fund Put only following written notice. You also state that a Fund will provide a Fund Put only if the Internal Revenue Service issues new guidance clarifying with a high degree of certainty that such a feature would not cause the LPP to become taxable as debt rather than equity for federal income tax purposes.

II. Analysis

A. Money Market Funds

As we noted above, the LPP are designed to be purchased by Money Market Funds. The instruments that Money Market Funds may purchase must meet Rule 2a-7's maturity and quality requirements.¹⁰ You acknowledge that a Money Market Fund's investment in preferred stock, including auction rate preferred stock, would not meet these requirements.¹¹ You assert,

⁸ You state that the EVC Put is not expected to be an ongoing feature of the LPP arrangements and will be offered only to the Liquidity Provider for the LPP issued in the first LPP offering by a Fund.

⁹ You state that the exercise of the EVC Put would create no obligation for a Fund to redeem its LPP.

¹⁰ Rule 2a-7's portfolio maturity conditions appear in paragraphs (c)(2) and (d) and the portfolio quality conditions appear in paragraph (c)(3). Rule 2a-7 contains conditions that apply to each investment a Money Market Fund proposes to make, as well as conditions that apply to a Money Market Fund's entire portfolio.

¹¹ See *Donaldson, Lufkin & Jenrette Securities Corporation*, SEC Staff No-Action Letter (Sept. 23, 1994) (denying a request for no-action assurance under Rule 2a-7 where preferred shares would have been subject to a conditional demand feature provided by a third-party bank).

however, that the LPP, together with the Liquidity Event Feature, is functionally equivalent to securities that meet Rule 2a-7's maturity and quality conditions. More specifically, you assert that the LPP and Liquidity Event Feature are similar to the preferred stock and liquidity feature described in a 2002 no-action letter, *Merrill Lynch Investment Managers*, SEC Staff No-Action Letter (May 10, 2002) (the "Merrill Lynch Letter"). You state that a Money Market Fund could rely on the staff's no-action assurances in the Merrill Lynch Letter in all material respects except that the Liquidity Event Feature differs from the liquidity feature in the Merrill Lynch Letter in two respects: the Liquidity Event Feature will not be exercisable upon a failure by a Fund to make a scheduled payment of dividends or redemption proceeds of the LPP, or a failure by a Fund to make scheduled payments of the required liquidation preference plus accumulated dividends, whether or not earned or declared (the "Non-Payment Triggers"). Thus, unlike the liquidity feature described in the Merrill Lynch Letter, the Liquidity Provider only would be obligated to unconditionally purchase all LPP subject to sell orders that have not been matched with purchase orders in a remarketing.¹²

You argue that the Non-Payment Triggers are not necessary because at worst a Fund's failure to make a dividend or redemption payment would require the Money Market Fund to wait six days until the next scheduled remarketing to sell its shares, when it would be entitled to the liquidation preference of the shares plus any accumulated and unpaid dividends. You argue that the absence of the Non-Payment Triggers would not have any material adverse impact on Money Market Funds.

B. Redeemable Securities

Section 2(a)(32) of the Investment Company Act defines "redeemable security" as "any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled ... to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof." Under Section 5(a) of the Investment Company Act, an open-end company is defined as a management company that is "offering for sale or has outstanding any redeemable security of which it is the issuer," and a closed-end company is defined as "any management company other than an open-end company." Thus, if the LPP were redeemable securities, then any Fund issuing LPP would be an open-end company and not a closed-end company.

You assert that the LPP should not be considered redeemable securities based on the plain wording of Section 2(a)(32) because of the Liquidity Event Feature or the EVC Put. The Liquidity Provider is required to purchase LPP in a remarketing if there are insufficient purchase

¹² Your letter includes some additional provisions that may be negotiated between the Funds and the Liquidity Providers, providing additional protections for the Liquidity Providers. See *supra* notes 6-8 and accompanying text. Because these conditions would not affect the Liquidity Providers' obligations to the Money Market Funds, however, these provisions are not relevant to the analysis of whether a Money Market Fund's acquisition of LPP would be consistent with the conditions in Rule 2a-7.

orders to fill sell orders. Although the Liquidity Provider could be considered a “person designated by the issuer” within the meaning of Section 2(a)(32) for purposes of paying liquidation amounts to an investor selling its LPP, the amounts are not paid from a Fund’s “current net assets” but rather from the Liquidity Provider’s assets. You also assert that, as with the Liquidity Event Feature, exercise of the EVC Put entails payment from EVC’s assets rather than from a Fund’s “current net assets.”

You concede that exercise of the Fund Put would result in a payment from a Fund’s current net assets of a proportionate share of such assets to the Liquidity Provider. You argue, however, that a Fund Put would not make the LPP a redeemable security because it involves substantial restrictions on transfer. This put right can be exercised only if a Liquidity Event has occurred and only if the Liquidity Provider has been unable, after a period of at least three months, to sell LPP it has been required to purchase as a result of a Liquidity Event. In support of your argument, you cite to two no-action letters: *Nebraska Higher Education Loan Program, Inc.*, SEC Staff No-Action Letter (Apr. 3, 1998) and *California Dentists’ Guild Real Estate Mortgage Fund II*, SEC Staff No-Action Letter (Jan. 4, 1990). In these letters, the staff considered whether a security is a redeemable security in the context of the exception in Rule 3a-7 and the exclusion in Section 3(c)(5)(C), respectively, from the definition of investment company under the Investment Company Act.¹³

You explain that in *Nebraska*, the loan program issued three series of variable rate demand bonds to finance the purchase of student loans from originating lenders. Bondholders were permitted to tender the bonds weekly to a paying agent unaffiliated with the issuer that would pay for the tendered bonds using the proceeds from remarketing the tendered bonds or, if the remarketing was unsuccessful, from the sale of the tendered bonds to Sallie Mae. For the first series, the issuer was required to purchase the bonds acquired by Sallie Mae as the liquidity provider if Sallie Mae had held such bonds for no less than three years and failed to sell them in a remarketing during that period. For the second series, the issuer was required to purchase the bonds acquired by Sallie Mae if Sallie Mae had held such bonds for no less than two weeks and failed to sell them in a remarketing during that period. For the third series, the required holding period was thirty days. The staff took the position that the bonds subject to the three-year holding period requirement were not redeemable securities for purposes of Section 2(a)(32) and Rule 3a-7 because the holding period was sufficiently restrictive. The staff, however, was unable to conclude that the bonds subject to a two-week or thirty-day holding period were not redeemable securities. You indicate that in *California Dentists* the staff used a similar approach

¹³ Rule 3a-7 conditionally excepts from the definition of investment company an issuer that “does not issue redeemable securities” and that “is engaged in the business of purchasing, or otherwise acquiring, and holding” financial assets that by their terms convert into cash within a finite time period. Section 3(c)(5)(C) of the Investment Company Act provides an exclusion from the definition of investment company for an issuer that is not engaged in the business of, among other things, “issuing redeemable securities” and that is primarily engaged in “purchasing or otherwise acquiring mortgages and other liens on and interest in real estate.”

in concluding that the restrictions on investor withdrawal rights would not cause the securities to be considered redeemable securities for purposes of Sections 2(a)(32) and 3(c)(5)(C).

You conclude that the LPP is not a redeemable security because of the Liquidity Event Feature or the EVC Put under the plain wording of Section 2(a)(32). You also conclude that the LPP is not a redeemable security because the exercise of the Fund Put is subject to significant restrictions similar to those in *Nebraska*. We agree.

C. Tender Offer

The Division of Corporation Finance believes that the offers to purchase LPP pursuant to the Liquidity Event Feature may constitute a tender offer subject to Sections 13(e), 14(d) and 14(e) of the Exchange Act, and Rule 13e-4 and Regulations 14D and 14E. Nevertheless, based upon your opinion that offers to purchase LPP pursuant to the Liquidity Event Feature do not constitute a tender offer, as well as the facts and representations made in correspondence and conversations with the staff, the Division of Corporation Finance, without necessarily concurring with the analysis or conclusions set forth in your letter, will not recommend that the Commission take enforcement action if such offers are conducted without complying with Rule 13e-4 and Regulations 14D and 14E.

In issuing this no-action position, the Division of Corporation Finance considered the following facts, among others, described in your letter:

- at the time of initial issuance and each remarketing, the Funds and the Liquidity Provider will make all offers and sales of LPP and any related security pursuant to an effective registration statement or in reliance on an available exemption from such requirements under the Securities Act of 1933 (the “Securities Act”);¹⁴
- the terms and conditions of the Liquidity Event Feature are fixed and will apply to each remarketing;
- the Liquidity Event Feature is open to all LPP holders;
- the Liquidity Provider will purchase all LPP at a price equal to the \$25,000 per share liquidation preference plus accumulated but unpaid dividends;
- an offering memorandum, as described in your letter, will be delivered on every remarketing date;
- any offering memorandum that is provided to investors will describe the operation of the Liquidity Event Feature and explain in detail how a Non-Clearing Remarketing, as described in your letter, will impact the dividend rate;

¹⁴ The staff of the Division of Corporation Finance notes that the Funds and the Liquidity Provider intend to sell LPP and any related security only to Qualified Institutional Buyers as defined in Rule 144A under the Securities Act. The staff also notes that all secondary market sales by LPP holders would occur through a remarketing process (as described above) in transactions that are exempt from the registration requirements under the Securities Act.

- in the event of a Non-Clearing Remarketing, the Paying Agent, as described in your letter, will issue a notice to LPP holders;
- the Liquidity Provider is required to sell all LPP that it holds, as a result of being required to purchase LPP to prevent a Non-Clearing Remarketing, at the next remarketing with no right to hold the LPP at a particular dividend rate;
- LPP holders other than the Liquidity Provider will have the ability to revoke their notice to participate in a remarketing until one business day prior to the remarketing date;
- the Liquidity Provider must sell at the rate set by the remarketing agent pursuant to the terms of the LPP and By-laws;
- payment for the LPP will occur promptly;
- neither the Liquidity Provider nor the Funds will take any steps to encourage or discourage holders of the LPP from triggering a Liquidity Event Feature; and
- in the event that the Liquidity Agreement will not be renewed, will otherwise be terminated or a new Liquidity Agreement with a replacement Liquidity Provider will be entered into, holders of the LPP will be notified by the Paying Agent at least two remarketings in advance of such event.

Your attention is directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 10(b) and 14(e), and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with Eaton Vance, the Liquidity Provider and the remarketing agent. The Division of Corporation Finance expresses no view with respect to any other questions that the Liquidity Event Feature may raise, including, but not limited to, the adequacy of disclosure concerning, and the applicability of other federal or state laws to, the purchase of the LPP and conduct of your remarketing, as described in your letter.

III. Conclusions

Based on the facts and representations set forth in your letter, the Division of Investment Management would not recommend that the Commission take any enforcement action under Sections 34(b) or 35(d) of the Investment Company Act or Rule 22c-1 thereunder against Money Market Funds if they purchase the LPP, as described in your letter, provided that such Money Market Funds otherwise comply with the conditions of Rule 2a-7. This response expresses our views on enforcement action only and does not express any legal or interpretive conclusion on the issues presented.

Further, based on the facts and representations set forth in your letter, and without necessarily agreeing with your analysis, the Division of Investment Management concurs that the Liquidity Event Feature, EVC Put and Fund Put features of the LPP will not cause the LPP to be redeemable securities under Section 2(a)(32) of the Investment Company Act.

Finally, based on the facts and representations set forth in your letter, and without necessarily agreeing with your analysis, the Division of Corporation Finance will not recommend that the

Commission take enforcement action if the offers as described in your letter are conducted without complying with Rule 13e-4 and Regulations 14D and 14E.

Because these positions are based upon the representations made to the Divisions in your letter, any different facts or representations may require a different conclusion.

/s/ Douglas Scheidt

Douglas Scheidt
Associate Director and Chief Counsel
Division of Investment Management

/s/ Michele M. Anderson

Michele M. Anderson
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June 12, 2008

Investment Company Act of 1940, as amended

Rule 2a-7
Section 2(a)(32)
Section 34(b)
Section 35(d)
Rule 22c-1
Section 5(a)

Securities Exchange Act of 1934, as amended

Sections 13(e) and 14(d) and Rule 13(e)-4 and Regulations 14D and 14E

Douglas Scheidt
Office of Chief Counsel
Division of Investment Management

Michele Anderson
Office of Mergers and Acquisitions
Division of Corporation Finance

Securities and Exchange Commission
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Re: Eaton Vance Management

Ladies and Gentlemen:

On behalf of Eaton Vance Management and its affiliates ("Eaton Vance"), and closed-end investment companies for which Eaton Vance currently serves as investment adviser (each a "Fund" and collectively the "Funds")ⁱ, we hereby request that the staff of the Division of Investment Management and the staff of the Division of Corporation Finance, as applicable (together, the "Staff"), advise us that it will not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action under Sections 34(b) or 35(d) of the Investment Company Act (the "1940 Act") or Rule 22c-1 thereunder against funds operating as money market funds in reliance on Rule 2a-7 under the 1940 Act, if they purchase certain

